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IN THE

Supreme Court of the United States

October Term, 1970

No. 370

MAGNESIUM CASTING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR INTERNATIONAL UNION, U. A. W. AS *AMICUS CURIAE*

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Statement of Interest

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), hereinafter referred to as the Union, or U.A.W., hereby respectfully submits this brief as Amicus Curiae * in opposition to the appeal of the petitioner from the decision of the Circuit Court of Appeals. The Union submits this brief in view of the fact that the question involved is of great importance to the future functioning of the National Labor Relations Board and the proper administration of the National Labor Relations Act. It is also of importance to the Union as such.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

The Union is Intervenor in *N.L.R.B.* v. *Olson Bodies, Inc.*, 420 F. 2nd 1187 (2d Cir. 1970), petition for cert. filed, No. 238, October 1970. The basic issues in case No. 238 and the case at bar are similar and the decision in the instant case may have a bearing on the *Olson Bodies* case. The Union is thus vitally interested in the outcome of the case at bar.

Questions Presented

Is the National Labor Relations Board bound to grant a review of a decision of its Regional Director in connection with a representation hearing before it issues a complaint or finding of violation of Section 8(a)(5) of the National Labor Relations Act, as amended?

Statutes Involved

The statutes involved are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), hereinafter referred to as the Act, and the Administrative Procedure Act as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*).

Statement of the Case

The petitioner herein seeks to reverse a decision of the first circuit court granting enforcement of an order issued by the National Labor Relations Board, on the ground that the Board failed to grant a review of the Regional Director's decision in a representation case in which certain determinations were made with reference to the bargaining unit. The petitioner contends that pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board was bound to review the decisions of the Regional

Director in a representation case, before it issued a finding involving violation of Section 8(a)(5) (Refusal to bargain).

In issue are interpretations of Section 3(b) and 10(c) of the Act.*

Section 3(b) of the National Labor Relations Act, as amended, provides that "[T]he Board is also authorized to delegate to its regional directors its powers of Section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election to take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of the regional director delegated to him under this paragraph . . .".

Section 10(c) of the National Labor Relations Act as amended, upon which the petitioner herein bases the thrust of his arguments entitled, "Reduction of Testimony to Writing; Findings and Orders of Board", provides: "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its descretion, the Board upon notice may take further testimony or hear argument. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order. . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be shall issue and cause it to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no excep-

* The National Labor Relations Act will be referred to at times as the Act.

tions are filed within twenty days after services thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Section 3(b) deals with delegation of powers to Regional Directors under Section 9(c) or (e) of the Act (Representation proceedings).

Section 10(c) deals with the method of taking testimony and filing reports as well as the power of the Board to dismiss a complaint after a report was submitted by a Trial Examiner or a member of the Board.

ARGUMENTS

It is respectfully submitted that neither Section 3(b) or Section 10(c) provide that the Board *must* grant a review of any decision of its Regional Director in a representation case.

On the contrary, under Section 3(b) the Board "may" grant review. This specifically implies that it is discretionary with the Board, whether or not to grant a review of a decision of the Regional Directors dealing with a question of representation. Nor is there any provision in Section 10(c) providing that no finding shall be made unless a review of the Regional Director's decision is made by the Board.

Universal Camera Corp. v. *NLRB,* 340 U.S. 474 (1951) does not hold that "under Section 10(c) of the Act, the Board must make the ultimate decision whether or not an unfair labor practice has been committed, and it must state its findings of fact before issuing an order to remedy any unfair labor practices it may find", as the petitioner herein seeks to interpret said decision (Brief of Petitioner, p. 8).

In that case, the Board reversed the findings and recommendations of a Trial Examiner. On a petition by the Board to the Circuit Court of Appeals, the Court granted enforcement. The Court in *N. L. R. B.* v. *Universal Camera Corp.*, 179 F. 2d 749 was faced with the problem of choosing between two different decisions: that of the Trial Examiner and that of the Board. The question of the duty of the Board to grant a review of a decision of a Regional Director, was not before the Court.

In that case, the Board reversed its Trial Examiner, and substituted its own judgment for that of the examiner. The Court merely analyzed the phrase "if supported by substantial evidence on the record as a whole" (Section 10(e) of the Act), and arrived at a conclusion that although the Court, on the basis of the evidence before the Trial Examiner might have arrived at a different conclusion, to wit, sustaining the Trial Examiner, it felt that it was, nevertheless, its duty to sustain the Board's order.

The Supreme Court (340 U.S. 474), remanding the case to the Circuit Court, compared the amended provisions of the National Labor Relations Act to those of the Administrative Procedure Act, and the phrase "substantial evidence on the record considered as a whole", contained in Section 10(e) of the Act, and reached the conclusion, that: (1) there is no basic difference between the Administrative Procedure Act and the Administrative provisions of the National Labor Relations Act, and held that the Court below erred in considering only the decision of the Board and not the "record as a whole" which included the Trial Examiner's Report and Recommendations.

The question of whether the Board must grant a review of a Regional Director's determination in a representation case before issuing findings of fact in an unfair labor practice charge was not before the Circuit Court nor the Supreme Court.

Nor was this issue presented in the case of *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 decided simultaneously with the *Universal Camera* case.

I. Section 3(b) of the Act does not require the Board to grant review of Regional Director's decisions in representation cases.

Section 3 deals with the creation and function of the National Labor Relations Board. Prior to the amendments of 1947 (Taft-Hartley Act) subsection (b) merely referred to activities of the Board in the event of a vacancy. It read:

> "(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed."

Prior to the 1947 amendments the Board consisted of three members. Two members constituted a quorum.

In 1947 subsection (b) was amended to include a sentence reading:

> "The Board is authorized to delegate to any group of three or more members any or all the powers which it may itself exercise."

The quorum requirement was changed from two to three members.

One of the reasons for the change was, undoubtedly, the fact that between 1935, the date of the original passage, of the Act and 1947, the importance and duties of the Board grew in stature, which dictated an increase in its composition.

In 1959 subsection (b) was further amended to authorize the Board to delegate *its powers* under Section 9 to its

regional directors, with the provision that the Board *may* review any action of a regional director, "upon the filing of a request therefor . . . by any interested person . . . but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director".

The amendments of 1947 and those of 1959 sought to alleviate the problem of growth of cases handled by the Board. It gave the additional power to the Board to delegate to its subordinate agencies (the Regional Directors) part of its duties and functions provided for in Section 9(b) of the Act. Thus, the Board was authorized "to delegate to its Regional Directors its powers under Section 9 to *determine* the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, . . . and to direct an election or take a secret ballot and certify the results thereof . . ."

It is obvious from a reading of the statute that Congress intended to confer on the Board the right to delegate its full authority under Section 9 to its Regional Directors. The Regional Directors, upon such delegation of authority assumed, for all intents and purposes, except for the power of review reserved to the Board, the locus of the Board itself. Pursuant to the provisions of Section 3(b) the findings and decisions of the Regional Directors affecting Section 9 of the Act are of the same stature and validity as those of the Board itself. If a claim can be made that decisions of Regional Directors *must* be reviewed by the Board itself, such claim could also be made that a decision by any panel of the Board must also be reviewed by the Board *on banc*. Such a contention would be contrary to the purposes of the act, for each decision of a Regional Director or a Board panel would ultimately have to be heard by the Board, and the Board would become hopelessly bogged down with reviews of Regional Directors' decision, while Regional Directors and panels

would be converted into mere hearing officers without any authority to "determine" anything.

It was precisely for the above reason that Congress made the question of review discretionary with the Board: the Board *may* or *may not* review any action of a Regional Director at its discretion.

That Congress intended to give the delegated agents, of the Board (Regional Directors) full authority to act is further demonstrated by the provision in Section 3(b) that the granting of a review by the Board "*shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the Regional Director.*" (emphasis supplied). Had Congress intended to provide for reviews or to limit the authority of Regional Directors to make decisions in 9(c) cases it would not have included the above provision.

Had Congress intended to have the Board review decisions of the Regional Directors affecting proceedings under Section 9, it would have used "shall" or "must" instead of "may". The choice of the word "may" makes the provision very clear and distinct, and it cannot be interpreted as "shall" or "must".

The Board in construing the review provisions of Section 3(b) laid down certain guidelines for granting a request for review. Section 102.67, Rules and Regulations, Series 8, as amended, provides:

> "(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final. . . .
>
> . . .
>
> "(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

. . .

"(d) Any request for review must be a self contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds when appropriate, said request must contain a summary of all evidence or rulings bearing on the issue together with page citations from the transcript and a summary of argument."

. . .

"(f) [D]enial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

It is clear from the above rule and regulations, that any request for review under Section 3(b) of the Act, if made in accordance with the provisions of Section 102.67(d) of the Rules and Regulations of the Board, contains either or all of the four grounds set forth in Section 102.67(c) of the Rules and Regulations. If the request is based on ground (1) it recites the "substantial question of law or policy raised"; on ground (2) it would point out the factual issue involved and set forth a summary of the evidence and rulings inclusive of page citations; on ground

(3) it would describe the conduct of the hearing and prejudicial errors in rulings; and on ground (4) it would set forth the compelling reasons for a change of Board policy.

The Board, unless derelict in its duties and performance, would, before denying a request for review first check whether it is based on any of its guidelines. It would then review the "contents" of the request: if under rule (1), whether it involves a substantial question of law or policy; if under (2), the Board would check those parts of the record and evidence referred to in the request, etc., etc.

Thus in any request for review the Board in actuality does review the pertinent ground before it denies the request.

The Court below was therefore correct in stating, that "the Board did review the evidence as summarized by the Company in its Request for Review, 29 C.F.R. #102.67(d)" in discussing the argument that the Board never reviewed the actual evidentiary record in the case.

There is no requirement in the statutes or rules that the Board must make and issue its own findings in a request for review. Its denial of a request for review on the ground, that it does not raise "substantial issues" is another way of stating that the Board considered the request and sustains the Regional Director.

There remains therefore the sole question whether, in view of the above the Board, after issuance of a complaint in an unfair labor practice, is nevertheless required to relitigate the issues previously determined by it in the representation proceeding.

The petitioner herein, in posing the "Question Presented" misrepresents the provision of Section 10(c) of the Act by assuming that it "requires that the Board itself must determine if a party has committed an unfair labor practice" (Petition for writ of certiorari, p. 2).

The reference in Section 10(c) to the Board's stating its findings of fact and issuance of an order must be read, and can be understood only when read, in relation to the other provisions affecting the Board's duties and powers: (Sect. 3(b), Section 10(b) and Section 10(c)). Surely Congress did not intend that each and every case must be reviewd *de novo* by the Board, after it was heard by a Trial Examiner or a panel of the Board. What it does mean, and intends to, is that findings and orders are issued in the name of the Board, but it does not preclude the Board from adopting the Findings and Recommendations of the agents and making them its own. Any other interpretation would obviate the right of the Board to delegate its authority either to Trial Examiners, panels, or Regional Directors.

II. The National Labor Relations Board did not violate Section 10(c) of the Act.

Section 10 as a whole deals with prevention of unfair labor practices. Subsection (a) describes the powers of the Board; subsection (b) sets down the procedure for the issuance of complaints, hearings, etc.; subsection (c) directs the reduction of testimony to writing and the issuance of findings and orders of the Board. The above and the remaining subsections of Section 10 all refer to the same issue: "prevention of unfair labor practices" and must be read and interpreted as part of a whole, not dissected into separate words and phrases.

Thus, Section 10(b) provides for hearings to be held before the Board or "any agent designated by the Board." Subsection (c) provides that the testimony taken by such agent "shall be reduced to writing and filed with the Board." In its discretion the Board *may* take further testimony or hear argument. "If upon the preponderance of the testimony taken the Board shall be of the opinion" that an unfair labor practice has been committed, "then

the Board shall state its findings of fact" and shall issue an order. The statute further provides that if the evidence was presented before an agent of the Board, he shall issue and cause to be served on the parties a proposed report together with a recommended order, "and if no exceptions are filed . . . after service thereof upon such parties, . . . such recommended order shall become the order of the Board and become effective as therein prescribed."

The section is clear in its phraseology and intent. The Board is not required to review each and every finding of its trial examiner. In fact, unless exceptions are filed within the prescribed time, the findings and recommendations of a trial examiner "become the order of the Board." If exceptions are filed the Board "in its discretion . . . *may* have public testimony or hear argument." It may also decide on the exceptions by merely reviewing the record without further testimony or argument. There is no requirement in the statute that the Board "*must* state its findings of fact before issuing an order." When no exceptions are filed, the Trial Examiner's findings of fact and recommended order automatically become Finding of Fact and Order of the Board. In numerous cases, even if exceptions are filed, the Board, unless it modifies the finding and recommended order of the Trial Examiner, simply adopts the findings and recommendations of the Trial Examiner without stating its own findings. This is exactly what happened in the instant case.

The Board has not violated the provisions of Section 10(c) of the Act.

III. The National Labor Relations Board did not violate the provisions of the Administrative Procedure Act.

This Court, in *Universal Camera Corp.* v. *N.L.R.B.* (*supra*) and in numerous other cases held that the provisions of the Administrative Procedure Act and those of the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision are identical in aim.

As Justice Frankfurter said:

> "It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act."

As mentioned *supra* there was a disagreement between the Board and the Trial Examiner. The Court in construing the phrase "substantial evidence on the record considered as a whole" (Section 10(e) of the Act), said:

> "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

In the instant case there was no disagreement between the Trial Examiner and the Board. Nor was there any disagreement between the Regional Director and the Board in the representation hearing. The Board under the provision of Section 3(b) adopted the decision of the Regional Director as its own. It denied the request of the petition for review. The Trial Examiner in deciding the case took judicial notice of the prior proceeding and decision of the Board in the representation hearing. The decision and recommendation of the Trial Examiner were affirmed by

the Board. The decision of the Board was made on the record as a whole.

The case before the Circuit Court did contain the record of the case as a whole. In fact, the court reviewed, in its decision, the evidence relating to the three men in issue and concluded "that the Regional Director's determination with regard to these three men is supported by substantial evidence".

> "Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence . . ."
>
> * * *
>
> "In the case presently before us, the Regional Director's findings of fact which had been adopted by the Trial Examiner and by the Board were as complete and 'reviewable' as any we have received from the Board."

Thus, the court below reviewed the record as a whole including the findings of the Regional Director, the Trial Examiner and that of the Board, as provided for in Section 10(e) of the Act.

IV. The Trial Examiner did not err in refusing to relitigate the issues in the representation proceeding.

Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board, Section 8, as amended, provides in part:

> "Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

In the instant case the issue involved was the finding of the regional director in the representation proceeding that certain assistant foremen be included in the unit. The petitioner, in its request for review, filed a "self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record" (Petitioner's brief, p. 8). Based on the contents of the "self-contained" document submitted by the petitioner, the Board "without the necessity of recourse to the record" decided that the request raised "no substantial issues warranting review." Its decision was an affirmance by the Board of the regional director's action, and the issue could not be relitigated in the subsequent unfair labor practice proceeding.

The mere fact that the decision of the Board in affirming the action of the regional director is "incomprehensible" to the petitioner was not sufficient reason for the Circuit Court to reverse the Board's findings and Order, nor is it sufficient reason for this Court to reverse the decision of the lower Court and the Board.

V. There is no real dispute between the circuits on interpretation of Section 3(b) or Section 10(c) of the Act.

The cases relied upon by the petitioner, to wit: *Pepsi-Cola Bottling Corp.* v. *N.L.R.B.*, 409 F. 2d 676, cert. denied, 396 U.S. 904 (1969) and *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F. 2d 78, do not sustain the contention of the petitioner that the Board may not find a refusal to bargain where it denied the company's request for review of the Regional Director's unit determination. In the first case the Circuit Court remanded the matter to the Board for further evidence on the important question of unit determination. The decision was based on the extent of the evidence to support the findings of the Regional Director as adopted by the Board. In the second case the Court

remanded the case to the Board, for the reason that the Board failed to explain why it reached its decision on the question of timeliness of the election. Had the Regional Director set forth reasons in his decision, the Court would not have remanded the case on the grounds that it did, for the explanation of the Regional Director would have become the explanation of the Board. In fact the Circuit Court was careful to dissasociate itself from the notion that the remand was caused by the Board's denial of the request for review by the company. In footnote 6, the Court said:

> "We do not reach the question of whether the Board could discharge its duty by adopting the reasons supplied by the Regional Director. *In this case the Regional Director gave no reasons.* The crux of his opinion is the conclusory statement that Clement-Blythe's operations are 'sufficiently established and stabilized and that they are manned by a substantial and representative segment of the Employer's ultimate working complement'."

It is, respectfully, submitted that had the Board granted the request for review and fully reviewed the entire record and come to the same conclusion without an explanation of its decision, the Court would still remand it for the same reasons.

In the instant case as well as in *Olson Bodies* (*supra*) there is no such lack of explanation as found in the *Clement-Blythe* case nor a lack of evidence as found in the *Pepsi-Cola* case. In the instant case the Regional Director heard the testimony as to whether or not the three employees are part of the bargaining unit. In the *Olson Bodies* case the company submitted numerous affidavits to the Regional Director upon the basis of which affidavits the Regional Director made an extensive and thorough finding of facts and conclusions of law.

CONCLUSION

The finding of the Court below "that the procedure followed by the Board in this case satisfied the requirements of the National Labor Relations Act, the Administration Procedure Act, and the demands of procedural fairness", should be affirmed.

Respectfully submitted,

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December, 1970.